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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 427

In the Matter of:

EASTERN SUPPLY COMPANY, a co-partnership, consisting of MUNROE E. GREENE and JOSEPH BLONSTEIN, partners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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OCTOBER TERM, 1959

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In the Matter of:

EASTERN SUPPLY COMPANY, a co-partnership, consisting of MUNROE E. GREENE and JOSEPH BLONSTEIN, partners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner EASTERN SUPPLY COMPANY, a co-partnership consisting of MUNROE E. GREENE and JOSEPH BLONSTEIN, partners, prays that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Third Circuit, entered in the above cause June 17, 1959, affirming the judgment of the United States District Court for the Western District of Pennsylvania.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 267 F. 2d 776, and is reproduced in the Appendix attached hereto.

The opinion of the District Court is reported at 170 F. Supp. 246, and is contained in the Appendix to the Brief submitted to the Court of Appeals at page 13a.

On September 11, 1959, the Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, extended the time for filing petition for writ of certiorari to and including October 1, 1959.

JURISDICTION

The order of the Court of Appeals was entered on June 17, 1959. The jurisdiction of this Court is invoked under Title 11, U.S.C. Section 47 (c).

QUESTIONS PRESENTED

1. Has the Court of Appeals erroneously interpreted and applied the applicable law in holding that a Creditors' Petition in Bankruptcy, prepared, signed, verified and filed by an attorney without proper authority so to do, may be "ratified" by the alleged petitioning creditors after the statutory period for filing such a petition has elapsed?

2. Has the Court of Appeals erroneously interpreted and applied Form 5 of the Bankruptcy Act and the cases and decisions applying thereto in holding that an attorney may prepare, sign, verify and file a Creditors' Petition in Bankruptcy based upon claims for goods alleged sold and delivered when such attorney lacks knowledge of the nature of the goods sold, the number of units of goods sold, whether or not such goods were ever delivered, and where his only knowledge of the amounts of the claims is on information received from collection agencies?

3. Has the Court of Appeals erroneously interpreted and applied that section of the Bankruptcy Act

which requires that the claims of petitioning creditors must be "not contingent as to liability" in holding that a Creditors' Petition in Bankruptcy is valid even though no such allegation is contained therein?

4. Have the District Court and the Court of Appeals abused their judicial discretion by permitting intervention in a Creditors' Petition in Bankruptcy by alleged creditors who permitted a default of over two (2) months to run against them without any excuse when the firm sought to be put into bankruptcy is in receivership proceedings in a state court?

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 21; Chap. 541, § 3, 30 Stat. 546; as amended July 7, 1952:

". . .

A petition may be filed against a person within four (4) months after the commission of an act of bankruptcy . . .".

11 U.S.C. § 95 (b); Chap. 579, § 16, 66 Stat. 425; as amended July 7, 1952:

"Three or more creditors who have provable claims liquidated as to amount and not contingent as to liability against any person which amount in the aggregate in excess of the value of security held by them, if any, to $500.00 or over, or, if all of the creditors of such person are less than twelve in number, then one or more of such creditors whose claim or claims equal such amount may file a petition to have him adjudged a bankrupt."

11 U.S.C. foll. § 53, Form 5:

"...

State of .....
County of ..... } ss.:

....., ..., and .....,
....., the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

.....,

.....,

.....,

Petitioners

Subscribed and sworn to before me this ..... day of ....., 19...

.....

.....

(Official character)"

STATEMENT OF THE CASE

Stated briefly, the facts of the instant case are as follows:

On March 24, 1958, Receivers were appointed for EASTERN SUPPLY COMPANY in proceedings at No. 3059 April Term 1958, in the Court of Common Pleas of Allegheny County, Pennsylvania. Thereafter, on April 10, 1958, upon proper notice, hearing was held in the said court proceedings at which hearing, the appointment of Receivers was made permanent. On April 25, 1958, in those same proceedings, a petition to sell personal property was filed, and on May 8, 1958, sale of the personal property of EASTERN SUPPLY COMPANY was made for the sum of Ninety three thousand five hundred ($93,500.00) dollars, said sale being had pursuant to proper notice and court order.

On July 23, 1958, four months less one day after the appointment of Receivers for EASTERN SUPPLY COMPANY, a Creditors' Petition at Bankruptcy No. 22947 in the District Court of the United States for the Western District of Pennsylvania was filed, seeking to have EASTERN SUPPLY adjudged a bankrupt.

This Petition was prepared, signed, verified and filed by Attorney Harry R. Levy. Attorney Levy did not receive appropriate authority to do so until approximately three (3) weeks after the statutory period for filing such a Petition had expired.

Thereafter, counsel for EASTERN SUPPLY filed a motion to dismiss the petition and two amendments to the motion to dismiss.

On September 5, 1958, hearing was held in the court below on the motion to dismiss the Creditors' Petition and the amendments to this motion.

On September 26, 1958, more than two months after the original Creditors' Petition had been filed, counsel for the petitioning creditors submitted to the court below a petition for leave to intervene in the Creditors' Petition. This petition for intervention was filed on behalf of three alleged additional creditors of EASTERN SUPPLY COMPANY, and was apparently an effort by counsel for the creditors to do belatedly what should have been done in the first instance, and thus attempt to circumvent the motions to dismiss the Creditors' Petition. Thereafter, on October 27, 1958, a motion to strike the petition for intervention was filed.

The District Court heard arguments on both the Motions to Dismiss and the Amendments thereto and on the Petition to Intervene. On January 8, 1959, the District Court denied the Motion to Dismiss and granted the Petition to Intervene. On June 17, 1959, the Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The Bankruptcy Act provides that a creditor's petition must be filed within four (4) months after an alleged act of bankruptcy. 11 U.S.C. § 21; Chap. 541, § 3, 30 Stat. 546; as amended July 7, 1952. A long line of cases have held that such a petition may be signed and verified by an attorney on behalf of the alleged petitioning creditors where such attorney is *duly authorized to do so* and where he has *personal knowledge of the facts. In re Pearl Coal Co.*, 30 F. Supp. 964 (D.C., Pa., 1940), 115 F. 2d 158 (C.C.A., 3rd Cir., 1940); *In re Holle*, 220 F. 2d 850 (C.C.A., 7th Cir., Ind., 1955); *In re Chequasset Lumber Co.*, 112 F. 56 (D.C., N. Y., 1901); *In re Vastbinder*, 126 F. 417 (D.C., Pa., 1903).

In the instant case the Creditors' Petition was filed four (4) months less one day after the alleged act of bankruptcy. The Petition was prepared, signed and verified by an attorney rather than by officers of the petitioning corporate creditors. The attorney did not receive proper authority to do so until approximately three (3) weeks after the Petition was filed and approximately three (3) weeks after the period to file the same had expired. The Court of Appeals in its decision admitted that "we have no direct authority saying that (such 'ratification') is applicable to bankruptcy petitions but in the absence of something to indicate to the contrary, the general principle is applicable." Appendix, pp. 16-17. It is submitted that an examination of the effect of such a rule compels the conclusion that the principle is inapplicable.

If an alleged creditor may sit back while a petition is filed and then at its leisure, after the period for filing

the petition has expired, "ratify" the petition, the four (4) month filing requirement of the Bankruptcy Act would become meaningless.

Moreover, during the period between filing and "ratification" the alleged bankrupt would find its assets frozen, its business at a standstill and its reputation irrevocably damaged while the creditor at its leisure was deciding whether or not to ratify the petition.

> "The filing of a petition in bankruptcy is not a matter to be recklessly undertaken. The business, the credit, the fiinancial standing, the property and reputation of the person against whom the petition is filed are at stake. The filing of a petition is frequently followed by the appointment of a receiver, which results in taking away from the alleged bankrupt all of his property, closing up and ruining his business and destroying his credit. Thus irreparable damage may result from an honest mistake." *In re Frank,* 234 F. 665, 666-667 (D.C., Pa., 1916), aff'd 239 F. 709 (C.C.A., 3rd Cir., 1917).

Another reason for granting the Writ is the manner in which the Court of Appeals interpreted and applied Form 5 of the Bankruptcy Act and the cases decided thereunder. Form 5 dictates that the verification to a Creditors' Petition must state that the facts set forth therein are true. An unbroken lines of cases has held that this requirement is met only by *personal knowledge* on the part of the affiant; a verification on information and belief or even on "knowledge and belief" in insufficient. *In re Vastbinder,* supra; *In re Bieler,* 295 F. 78 (C.C.A., N. Y., 1923); *In re Heltman-Thompson Co.,* 83 F. Supp. 156 (D.C., Mich., 1949); *In re Lippincott & Co., Inc.,* 3 F. Supp. 1019 (D.C., Del.,

1933); *In re Pickering Lumber Co.*, 1 F. Supp. 82 (D.C., Mo., 1932).

The verification to the within Creditors' Petition is in the proper form but the testimony of Harry R. Levy as taken on deposition and as set forth in the Appendix to the Brief submitted to the Court of Appeals on pages 26a to 28a inclusive indicates clearly that, insofar as the claims for goods sold and delivered set forth in the Petition are concerned, Mr. Levy lacked personal knowledge of the nature of the goods allegedly sold, the number of units sold, and whether or not such goods were ever actually delivered to the alleged bankrupt. In fact his sources of information as to the *amount* of the claims were collection agancies. In short, at the time Mr. Levy "verified" the Creditors' Petition, he could not have verified that the facts set forth therein were true because he lacked knowledge of the facts.

In the *Frank* case, supra, while the verification was in proper form, the testimony of the affiants indicated that they were without knowledge of the facts set forth in the Petition. Upon motion of counsel for the alleged bankrupt the District Court dismissed the Petition and the Court of Appeals for the Third Circuit affirmed. Similarly, in the instant case the Petition should have been dismissed.

As amended in 1952, Section 95 (b) of the Bankruptcy Act requires that the claims of petitioning creditors be "not contingent as to liability". This language did not appear in the Section prior to the Amendment. By adding the language Congress evidently intended to change the jurisdictional requirements for claims.

In the case of *In re State Realty Co. of Boston*, 131 F. Supp. 554 (D.C., Mass., 1955) the Court stated:

"To qualify as a petitioning creditor, a creditor must set forth in his petition a provable claim liquidated as to amount *and not contingent as to liability.* Bankruptcy Act, § 59, sub. (b), 11 U.S.C.A. § 95, sub. (b). The existence and nature of these claims should be set forth with such particularity that the court can find from the petition the essential jurisdictional facts, *and if this requirement is not met, the petition should be dismissed.*" (Emphasis supplied.) p. 555.

Thus the court in the *State Realty* case viewed the 1952 amendment as a real and substantial change setting forth a jurisdictional requirement. If such a jurisdictional requirement is not alleged, the petition should be dismissed. In the instant case it was not alleged. Moreover, in the instant case the Creditors' Petition, taken together with the testimony of Attorney Levy, makes it clear that Mr. Levy could not have verified that the claims were not contingent; the Petition alleges claims for goods sold and delivered and Mr. Levy testified that he had no knowledge as to whether or not the goods were ever actually delivered. No appellate court case dealing with the Amendment to the Bankruptcy Act set forth above could be found. It is submitted that this Honorable Court should decide whether the Amendment is, as it appears to be and as Congress evidently intended, a new jurisdictional requirement, or whether it is mere "verbiage" as indicated by the opinion of the Court of Appeals. Appendix, p. 17.

Finally, both the District Court and the Court of Appeals saw fit to permit three additional alleged creditors to intervene in the Creditors' Petition despite the

facts that (1) over two months had elapsed before such intervention was sought, (2) that the intervening creditors (represented by Mr. Levy) had knowledge of the filing of the original petition, (3) that no reason or excuse for such delay was offered, and (4) the firm sought to be put into bankruptcy had been in a state court receivership for approximately six months before such intervention was sought.

In the case of *In re Refund Cash Grocery*, 30 F. 2d 158 (D.C., Id., 1928) the court, in dismissing a Creditor's Petition and refusing leave to amend the same, noted that the firm sought to be put into bankruptcy was already in receivership. The court properly noted that a bankruptcy action would only entail additional expenses and further diminish the debtor's assets to the detriment of the creditors. The court stated:

> ". . . if the estate of the company is administered in and through the bankruptcy court, it would entail additional statutory fees, commissions, and costs, clearly in excess of the amount expended in the receivership proceedings." Ibid, p. 159.

The court further stated:

> ". . . we must assume that the state court will, according to law and to the interests of the creditors concerned, properly dispose of all of the assets of the company. The inquiry then is: What lawful benefit can accrue to these three petitioners, after the expense has already been incurred in seeking to put the company into bankruptcy . . . . All of the creditors . . . are now being represented by the receiver . . . ." Id.

Similarly, in the instant case, before intervention was sought, the debtor's assets had been sold in the

state court proceedings and the creditors therein (*including the petitioning and intervening creditors herein*) received payment of their claims against the debtor.

To permit intervention in such a situation, even assuming that there was a valid Creditors' Petition in which to intervene, was a manifest abuse of discretion.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,865

IN THE MATTER OF EASTERN SUPPLY COMPANY, A CO-PARTNERSHIP CONSISTING OF MUNROE E. GREENE AND JOSEPH BLONSTEIN, PARTNERS.

EASTERN SUPPLY COMPANY, A CO-PARTNERSHIP, CONSISTING OF MUNROE E. GREENE AND JOSEPH BLONSTEIN, PARTNERS, *Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 28, 1959

BEFORE GOODRICH, KALODNER and STALEY, *Circuit Judges*

OPINION OF THE COURT

(Filed June 17, 1959)

By GOODRICH, *Circuit Judge.*

This is an appeal from an order in bankruptcy in which the court refused to dismiss the original petition and subsequent intervening petitions. The case was throughly considered by the trial judge who wrote a careful opinion going into each one of the questions raised here. 170 F.Supp. 246 (W.D. Pa. 1959). We have very little to add to his very competent treatment of the subject.

It appears that the bankrupt was in receivership in a Pennsylvania state court. One day before the statutory period expired, three business firms alleging themselves to be creditors signed a petition for an adjudication of involuntary bankruptcy.[1] This petition was signed on behalf of each of the firms by Harry R. Levy, Esquire, who signed both as attorney-in-fact and attorney-at-law. In addition the verification was signed "Harry R. Levy." The verification said: "Harry R. Levy, Attorney in Fact for . . . [named creditors] the petitioners within named, do hereby make solemn oath that the statements contained in and within the foregoing petition, subscribed by them, are true."

The appellant says that this will not do. He says a verification "must contain a statement that he is the duly authorized agent for the creditors, and that he has authority to sign the petition on behalf of the creditors." The argument made by appellant takes us over a very great deal of the ground covered by this Court in its decision in *In re Pearl Coal Co.*, 115 F.2d 158 (3rd Cir. 1940). Appellant would have us dismiss much of our discussion there as dictum. Whether dictum or not, a re-examination of the case leads us to believe that what was said there was correct. It was pointed out that authority to sign nearly all kinds of documents may be conferred upon an agent and that a petition in bankruptcy is not one of the exceptions. To what we said in *Pearl* we may add that the signing of such a document

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1 See § 3 of the Act, as amended, 66 STAT. 421-22 (1952), 11 U.S.C.A. § 21 (Supp. 1958).

2 Section 18(c) of the Act states "All pleadings setting up matters of fact shall be verified under oath." 30 STAT. 551 (1898), 11 U.S.C.A. § 41(c) (1953).

by one on behalf of another carries with it the general warranty of authority by an agent who does acts on behalf of a principal. See RESTATEMENT, AGENCY 2d § 329 (1958).

From the foregoing we think it clear that the petition signed "Attorney in Fact" was sufficient on its face. Likewise, the verification stating that Levy was attorney-in-fact was an adequate designation of authority. See 3 COLLIER, BANKRUPTCY ¶ 18.35 at n.28 (14th ed. Moore & Oglebay 1956).

In similar fashion appellant's argument that an attorney cannot sign or verify the petition in the absence of an emergency has been settled by the discussion in the *Pearl case,* 115 F.2d at 160.

The appellant secured the deposition of Mr. Levy.[3] On the basis of information gained from this deposition he makes two points. One point is that Mr. Levy did not have authority from the petitioning creditors to sign the petition. The appellant's argument on this question of authority goes almost to the place of requiring a corporate resolution before a corporate employee may properly sign, on behalf of his employer, an involuntary bankruptcy petition against a debtor. He does not, however, give us authority for such a strict rule and we do not think that it exists.

The further point is pressed that the attorney's authority came too late, that is, after the petition was

3 We are not going into the question of whether the deposition was properly secured at this stage or whether the appellant can attack only those defects which appear on the face of the petition, because we think that what was disclosed in the deposition does not materially affect the result in the case.

filed. But we should bear in mind the general rule that the ratification of an act purported to be done for a principal by an agent is treated as effective at the time the act was done. In other words, to talk technical even though fictitious language, the ratification "relates back" in time to the date of the act by the agent. We have no direct authority saying that this is applicable to bankruptcy petitions but in the absence of something to indicate to the contrary, the general principle is applicable. See *Kay v. Federal Rubber Co.*, 46 F.2d 64, 65 (3d Cir. 1930); RESTATEMENT, AGENCY 2d §§ 82, 100A (1958).

The other point appellant makes out of this deposition is that it shows that Mr. Levy had no "knowledge" of the transactions with the bankrupt by the petitioning creditors. These claims are for goods sold and delivered. We may take it for granted that Mr. Levy was not in the stockroom when the goods were packed nor was he in the receiving room of Eastern Supply when freight shipments arrived. Neither were the presidents of any of the corporations concerned. Indeed, one's imagination is tempted to spread itself in thinking how a company like United States Steel Corporation would ever be able to file a claim in bankruptcy against one of its customers if personal knowledge on the part of the signer were required. Is the president to get himself a resolution of the board, then observe the loading of the steel products on the railroad cars and follow them into the receiving room of the buyer? We cannot think that the statute[4] meant any such thing as this. Our knowledge in most affairs in life comes to us from information communicated to us by others. We do not

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4 See note 2, *supra*.

think there is an exception in the case of knowledge required for one filing a bankruptcy petition.

A final attack on the original petition is based upon a change in wording which was made in the Bankruptcy Act in 1952. Section 59(b) starts by saying, "Three or more creditors who have provable claims liquidated as to amount and not contingent as to liability...."[5] The section as it formerly stood required that the claims be "fixed as to liability and liquidated as to amount."[6]

The petition, following Supreme Court Form No. 5, was in the words used before the amendment. It is attacked on this ground.

We cannot see any material difference between the wording of the amendment and the prior wording of the section. In any event, we have no hesitancy in saying that the allegation that the claim is fixed as to liability and liquidated in amount is adequate for a claim based on goods sold for a definite price and delivered. To hold otherwise would, it seems to us, carry an insistence upon verbiage to a point that would make the rules of common law pleading as simple as a primer.

The appellant's last point attacks the permission which the court gave for other creditors to intervene. The trial judge said and the appellant says and the appellee admits that if the original petition is void later intervention will not save the day. But we have already concluded that the original petition is to stand. Any

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5 66 STAT. 425, 11 U.S.C.A. § 95(b) (Supp. 1958).
6 52 STAT. 868, 11 U.S.C.A. § 95(b) (1943).

intervention by these same creditors cannot prejudice the appellant.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.